**Testimony of**
**Laughlin McDonald**
**Director, Voting Rights Project**
**American Civil Liberties Union, Fnd.**

**Before the House Committee on the Judiciary**
**Subcommittee on the Constitution**

**The Voting Rights Act: The Continuing Need for Section 5**

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I appreciate the opportunity to appear before you today and share my views on the need for Congress to extend Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

I have attended a number of conferences recently on the Voting Rights Act and the special provisions that are scheduled to expire in 2007. Invariably someone will make the comment, "we don't need Section 5 anymore because Bull Connor is dead." I have always found such statements to be simpleminded in the extreme. Bull Connor is dead, but so is Thomas Jefferson. So is George Washington. So is my grandfather. So is William Tecumseh Sherman. So is William Shakespeare, and the list goes on and on. Simply because all of these people are dead, it does not mean that they are erased from memory and history, that their legacies no longer exist, that they do not influence the way we think and act. The past continues to inform the present.

Recent voting rights litigation throughout the South and in Indian Country, as well as Court findings of widespread and systematic discrimination against minority voters underscores the need for continuing Section 5, the preclearance provision of the Voting Rights Act.

Section 5 of the Act requires certain jurisdictions with a history of discrimination to obtain approval or “preclearance” from the U.S. Department of Justice or the U.S. District Court in D.C. before they can put into effect any changes to voting practices or procedures. Under the statute, federal approval requires proof that the proposed change is not retrogressive, i.e. does not have a discriminatory purpose and “will not have the effect of “denying or abridging the right to vote on account of race or color.”[1] One of the reasons Section 5 is such an effective tool for preventing discrimination is it allows

1 42 U.S.C. §1973c.

harmful voting laws and practices to be evaluated and rejected before they can take effect. The Supreme Court acknowledged that Section 5 was an “uncommon exercise of congressional power”, but found that it was justified by the exceptional history of voting discrimination in the covered jurisdictions.[2]

While progress has been made toward the inclusion of minority voters in the American political process, a careful review of the Section 5 covered jurisdictions reveal that discrimination in voting continues and the need for Section 5 remains. Public officials in covered states continue to adopt election laws and procedures that deny minorities' equal access to the political process. As recently as last year, a federal court determined that South Dakota discriminated against Native-American voters by packing them into a single district to remove their ability to elect a second representative of their choice to the state legislature. Bone Shirt v. Hazeltine, 336 F. Supp. 2nd 976 (D.S.D. 2004). Unfortunately, South Dakota is not an anomaly; there are countless other examples of attempts to disfranchise minority voters and to dilute minority voting strength in Section 5 covered jurisdictions.

## Minority Vote Dilution in South Carolina

### A. Charleston County Council

There is abundant, modern day evidence showing Section 5 is still needed to protect the equal right to vote of minorities in the covered jurisdictions. Charleston County, South Carolina, which prides itself on its aristocratic traditions and civility is a case in point. In a 2004 opinion, the Fourth Circuit Court of Appeals unanimously affirmed a decision of the district court invalidating at-large elections for the Charleston County Council. The court of appeals found that "evidence presented by both parties supported the district court's conclusion 'that voting in Charleston County Council elections is severely and characteristically polarized along racial lines.'" United States v. Charleston County, 365 F.3d 341, 350 (4th Cir. 2004). The court of appeals further noted "the rarity with which minorities are elected is not unique to the County Council; disproportionately few minorities have ever won any of the at-large elections in Charleston County." Id.

Following the election of several black candidates to the nine member Charleston County school board in 2000, the county legislative delegation, in what the district court described as

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2 *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

an "episode[ ] of racial discrimination against African-American citizens attempting to participate in the local political process," tried to change the method of elections to the system used by the County Council and to limit the board's fiscal authority. These voting changes would have made it more difficult for African American voters to elect their candidate of choice. The measures were passed by the legislature but were vetoed by the governor. After the 2002 elections, only one African-American remained on the school board. United States v. Charleston County, 316 F.Supp.2d 268, 280, 286 n.23 (D.S.C. 2003).

Other factors contributing to minority vote dilution found by the courts included: "fewer financial resources" available to minority candidates to finance campaigns; "past discrimination that has hindered the present ability of minorities to vote or to participate equally in the political process;" "[t]he on-going racial separation that exists in Charleston County–socially, economically, religiously, in housing and business patterns–[which] makes it especially difficult for African-American candidates seeking county-wide office to reach out to and communicate with the predominantly white electorate;" "significant evidence of intimidation and harassment" of blacks "at the polls during the 1980s and 1990s and even as late as the 2000 general election;" and "incidents of subtle or overt racial appeals" in campaigns, such as white candidates distributing darkened photos of their black opponents to call attention to their race. United States v. Charleston County, 365 F.3d at 351-53; 316 F.Supp.2d at 286 n.23, 294-95.

B. Charleston County School District

In 2003, the state legislature once again enacted, and this time the governor signed, legislation adopting the identical method of elections for the Board of Trustees of the Charleston County School District that had earlier been found in the county council case to dilute minority voting strength in violation of Section 2 of the Voting Rights Act. Under the pre-existing system, elections for the school board were non-partisan, which allowed minority voters the opportunity to "bullet vote" and elect candidates of their choice in multi-seat contests. That possibility would have been effectively eliminated under the proposed new partisan system.

In denying preclearance to the county's submission, the Department of Justice concluded that "[t]he proposed change

would significantly impair the present ability of minority voters to elect candidates of choice to the school board and to participate fully in the political process." It noted further that:

> every black member of the Charleston County delegation voted against the proposed change, some specifically citing the retrogressive nature of the change. Our investigation also reveals that the retrogressive nature of this change is not only recognized by black members of the delegation, but is recognized by other citizens in Charleston County, both elected and unelected.

R. Alexander Acosta, Assistant Attorney General, to C. Havird Jones, Jr., February 26, 2004.

Section 5 thus prevented Charleston County from implementing a new and retrogressive voting practice, one which everyone understood was adopted to dilute black voting strength and insure white control of the school board. It also prevented the need for an expensive and time consuming lawsuit seeking to invalidate the new method of elections under Section 2.

C. Statewide Redistricting in South Carolina

Statewide redistricting in South Carolina following the 2000 census provides another modern day example of the continuing racial polarization that characterizes the political process in the state. Racial polarization occurs when majority voters, by bloc voting for its candidates in a series of elections, systematically prevents an ethnic minority from electing most or all of its preferred candidates. The consequences of racial polarization can be devastating because it can deprive minority communities of a committed advocate in councils of governments. In so doing, it impacts the allocation of resources for essential public services such as libraries, schools, public safety, commercial development affordable housing, and public transportation.

In 2002, a three-judge court, after a reapportionment deadlock by the state legislature and the governor, implemented a court ordered redistricting plan for the state's house, senate, and congressional delegation. The court, which consisted of three South Carolinians (Judges Traxler, Perry, and Anderson), noted that the:

> disturbing fact [of racially polarized voting] has seen little change in the last decade. Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary and general elections. Statewide, black citizens generally are a highly politically cohesive group and whites engage in significant white-bloc voting.

Colleton County Council v. McConnell, 201 F.Supp.2d 618, 641 (D.S.C. 2002).

The three-judge court took special note that the governor and the legislature "have proposed plans that are primarily driven by policy choices designed to effect their particular partisan goals." Id. at 628, 659. Those choices included protecting incumbents and assigning the minority population to maximize the parties' respective political opportunities.

**Minority Vote Dilution In Georgia**

A. The Switch to At-Large Voting

Following passage of the Voting Rights Act and its several amendments, which resulted in increased black registration and political participation, a number of jurisdictions which used district elections switched to holding their elections at-large. The Supreme Court has noted the potential for discrimination inherent in at-large voting and why its adoption is subject to scrutiny under Section 5:

> Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.

Allen v. State Board of Elections, 393 U.S. 544, 569 (1969).

From 1974 to 1993, more than 100 lawsuits were brought against no fewer than 40 cities (in 41 lawsuits) and 62 counties (in 67 law suits) in Georgia alone, challenging at-large election plans as discriminatory violations of either the constitution, the Voting Rights Act, or both. Of the 108

lawsuits during this 19 year period in Georgia, more than three-quarters (72) were not resolved until 1983 or later. Of these 72 cases, all but approximately five were resolved by the creation of single member districts, which allowed blacks the opportunity to elect candidates of their choice. The persistence of at-large voting schemes as a mechanism to dilute minority votes well into the 1980s and 1990s is a testament to the continued need for Section 5, as well as the wisdom of Congress in reauthorizating the special provisions in 1982.

**Minority Vote Dilution in South Dakota**

Let me cite a present day example from Indian Country that supports the extension of Section 5. As a result of the 1975 amendments of the Voting Rights Act, two counties in South Dakota, Shannon and Todd, which are home to the Pine Ridge and Rosebud Indian Reservations, respectively, became subject to Section 5 preclearance. 41 Fed. Reg. 784 (Jan. 5, 1976). Eight counties in the state, because of their significant Indian populations, were also required to conduct bilingual elections–– Todd, Shannon, Bennett, Charles Mix, Corson, Lyman, Mellette, and Washabaugh. 41 Fed.Reg. 30002 (July 20, 1976).

William Janklow, the Attorney General of South Dakota, was outraged over the extension of Section 5 and the bilingual election requirement to his state. In a formal opinion addressed to the South Dakota secretary of state, he derided the 1975 amendments to the Voting Rights Act as a "facial absurdity." Borrowing the States' Rights rhetoric of southern politicians who opposed the modern civil rights movement, he condemned the Voting Rights Act as an unconstitutional federal encroachment that rendered state power "almost meaningless." He quoted with approval Justice Hugo Black's famous dissent in South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966) (which held the basic provisions of the Voting Rights Act constitutional), that Section 5 treated covered jurisdictions as "little more than conquered provinces." Janklow expressed the hope that Congress would soon repeal "the Voting Rights Act currently plaguing South Dakota." In the meantime, he advised the secretary of state not to comply with the preclearance requirement. "I see no need," he said, "to proceed with undue speed to subject our State's laws to a 'one-man veto' by the United States Attorney General." 1977 S.D. Op. Atty. Gen. 175; 1977 WL 36011 (S.D.A.G.).

Although the 1975 amendments were never in fact repealed, state officials followed Janklow's advice and essentially ignored the preclearance requirement. From the date of its official coverage in 1976 until 2002, South Dakota enacted more than 600 statutes and regulations having an effect on elections or voting in Shannon and Todd Counties, but submitted fewer than ten for preclearance. The state did not begin meaningful compliance with Section 5 until they were sued by tribal members, represented by the ACLU, in 2002. Following negotiations among the parties, the court entered a consent order in which it directed the state to develop a comprehensive plan "that will promptly bring the State into full compliance with its obligations under Section 5." Quick Bear Quiver v. Hazeltine, Civ. No. 02-5069 (D.S.D. December 27, 2002), slip op. at 3. The state made its first submission in April 2003, and thus began a process that is expected to take up to three years to complete.

Because of Section 5 private plaintiffs were able bring a lawsuit against South Dakota in order to compel the state to comply with the Voting Rights Act.

**The Deterrent Effect of Section 5**

There are also those who say we no longer need Section 5 because there are few objections. That argument overlooks the deterrent effect of preclearance. Just this year, in 2005, the Georgia legislature redrew its congressional districts, but before doing so it adopted resolutions providing that it must comply with the non-retrogression standard of Section 5. The plans that it drew maintained the black voting age population in the two majority black districts (represented by John Lewis and Cynthia McKinney) at almost exactly their pre-existing levels, and it did the same for the two other districts (represented by Sanford Bishop and David Scott) that had elected black members of congress. There was no objection by the Department of Justice when the plan was submitted for preclearance. That does not mean that Section 5 did not play a critical role in the redistricting process. Rather, it means that Section 5 likely encouraged the legislature to ensure that any voting changes would not have a discriminatory effect on minority voters.

**The Application of Section 5 by the Courts**

Section 5 also continues in importance because it is applied by the federal courts. The three-judge court in Colleton County

Council v. McConnell, the litigation filed after the governor and the legislature in South Carolina deadlocked over redistricting in 2001, concluded that it was obligated to comply with Sections 2 and 5 of the Voting Rights Act and proceeded to draw plans that maintained the state's existing majority black congressional district and actually increased the number of majority black house and senate districts. Id. at 655-56, 661, 666. The governor had argued that districts with black populations as low as 44.61% provided black voters an equal opportunity to elect candidates of their choice within the meaning of the Voting Rights Act. The court disagreed. Noting the "high level of racial polarization in the voting process in South Carolina," it concluded that "a majority-minority or very near majority-minority black voting age population in each district remains a minimum requirement." Id. at 643 and n.22.

In Mississippi, which lost a congressional seat as a result of the 2000 census, both the state court and the federal court became involved in the redistricting process and drew plans relying upon the non-retrogression standard of Section 5 which maintained one of the districts as majority black. Smith v. Clark, 189 F.Supp.2d 529, 535, 540 (S.D.Miss. 2002).

In Larios v. Cox, 314 F.Supp.2d 1357, 1360 (N.D.Ga. 2004), in implementing court ordered redistricting for the Georgia house and senate to remedy a one person, one vote violation, the court held that complying with the population equality standard was "a paramount concern in redrawing the maps." Next in importance was "to insure full compliance with the Voting Rights Act."

The district court in South Dakota adopted a court ordered plan for the house and senate this year (2005) to cure a Section 2 violation in a vote dilution suit by Native Americans. In creating new majority Indian districts, the court held that it had adhered to the state's "redistricting principles," which included "protection of minority voting rights consistent with the United States Constitution, the South Dakota Constitution, and federal statutes." Bone Shirt v. Hazeltine, CIV. 01-3032-KES (D.S.D. Aug. 18, 2005), slip op. at 12-3.

Following the 2000 census, the city of Albany, Georgia, adopted a new redistricting plan for its mayor and commission to replace an existing malapportioned plan, but it was rejected by the Department of Justice under Section 5. The department noted that while the black population had steadily increased in Ward 4

over the past two decades, subsequent redistrictings had decreased the black population "in order to forestall the creation of a majority black district." The letter concluded that it was "implicit" that "the proposed plan was designed with the purpose to limit and retrogress the increased black voting strength in Ward 4, as well as in the city as a whole." J. Michael Wiggins, Acting Assistant Attorney General, to Al Grieshaber, Jr., City Attorney, September 23, 2002.

In June 2003, the city submitted a second redistricting plan to the Department of Justice for preclearance. In response, the department requested additional information to enable it to make a determination whether the plan complied with Section 5. In light of the pendency of a municipal election in November 2003, the city notified the department that it was withdrawing its submitted plan, and that the upcoming election would be held under the existing 1990 plan, despite the fact that it contained an unconstitutional deviation among districts of 53%.

Black residents of the city, represented by the ACLU, brought suit to enjoin further use of the malapportioned plan, and requested the court to supervise the construction and implementation of a remedial plan that complied with one person, one vote and the Voting Rights Act. In a series of subsequent orders, the court granted the plaintiffs' motion for summary judgment, enjoined the pending elections, adopted a remedial plan prepared by the state reapportionment office, and directed that a special election for the mayor and city commission by held in February 2004. The court emphasized that "[i]n drawing or adopting redistricting plans, the Court must also comply with Sections 2 and 5 of the Voting Rights Act." Under the court ordered plan, blacks were 50% of the population of Ward 4, and a substantial majority in four of the other wards. Wright v. City of Albany, Georgia, 306 F.Supp.2d 1228, 1235, 1238 (M.D.Ga. 2003), and Order of December 30, 2003. But for Section 5, elections would have gone forward under a plan in which purposeful discrimination was "implicit," and which could only have been challenged in time consuming vote dilution litigation in which the minority plaintiffs would have borne the burden of proof and expense.

**Conclusion**

These cases from South Carolina, Georgia, Mississippi, and South Dakota are the proverbial tip of the iceberg. I would like to submit for the record an article I wrote that was

published this year by the American Indian Law Review on voting rights litigation in South Dakota since the 1982 extension and amendment of the Voting Rights Act. Laughlin McDonald, "The Voting Rights Act in Indian Country: South Dakota, A Case Study," 29 Amer. Ind. L. Rev. 43 (2004-2005). I have also written a chapter on modern voting rights litigation throughout Indian country for a book scheduled to be published by the Russell Sage Foundation.

The continuing voting rights violations throughout the Section 5 covered jurisdictions, the deterrent of Section 5, as well as the role the Courts have played in thwarting attempts to diminish minority voting strength underscores the continuing need for the extension of Section 5 of the Voting Rights Act. We at the ACLU are preparing a report on the voting rights litigation in which we have been involved since the 1982 extension of the Voting Rights Act, amounting to some 300 cases. We will, of course, share all of these reports with this committee and are confident they will help make the case for the extension of Section 5.